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Nos. 85-93 and 85-428

In the Supreme Court of the United States

OCTOBER TERM, 1985

P.E. BAZEMORE, ET AL., PETITIONERS

v.

WILLIAM C. FRIDAY, ET AL.

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

WILLIAM C. FRIDAY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL PETITIONERS

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In our opening brief, our primary argument was that the court of appeals erred in holding that black state employees did not establish a claim under Title VII by (a) demonstrating current salary disparities between themselves and similarly situated white employees, and (b) showing that these current disparities result from a state policy, implemented before 1965, of paying blacks less than whites.

The Service's response is mostly factual. Respondents appear to suggest (Br. 33-34 & App.)[1] that there were no pre-Act salary disparities between blacks and whites, and also to argue (Br. 30-34) that any such disparities that did exist were not intentional. They also contend (Br. 27-28) that all jobs in the Service are sufficiently different to invalidate any comparison between salaries of black and white employees to ascertain if salary disparities are racially based. None of these contentions has merit.

We also disagree with several points made by private petitioners. Private petitioners make the largely factual argument that the post-Act system of admissions to Extension Service related clubs has not been truly open and nondiscriminatory; they also contend that the Service is vicariously liable for discrimination by various counties in the selection of county chairmen.

1. Insofar as the Service suggests (Br. 33-34 & App.) that there were no pre-Act racially-based salary disparities, this is contrary to the concurrent findings of the courts below.[2] The district court found

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[1] "Br." refers to the brief for the respondents. "Br. App." refers to the appendix bound with that brief. "Pet. App." refers to the separately bound appendix filed with the petition in No. 85-93. "U.S. Pet." refers to the petition in No. 85-428. "U.S. Br." refers to the brief for the federal petitioners. "Pet. Br." refers to the brief filed by the private petitioners. "Am. Br." refers to the amicus curiae brief filed by the AFL-CIO. "C.A. App." refers to the 10-volume court of appeals appendix, 10 copies of which have been lodged with this Court.

[2] Moreover, the Service's comparison chart (Br. App. 1a-3a), listing 1972 salaries of pre-1965 hires, does not demonstrate that blacks were paid as much as comparable whites, as the chart does not account for such factors as tenure and education.

it "undisputed" that before the merger of the black and white branches in 1965, the Service paid black agents less than white ones (Pet. App. 120a), and the court of appeals adopted this finding (Pet. App. 359a). While it is true, as the Service points out (Br. 32), that neither court below found that the racial disparities were based on pre-Act intentionally set "wage scales," this is not dispositive of the question of intentional discrimination. A purposeful decision to pay black employees less than comparable white employees, whether based on wage scales or on individual case-by-case determinations, constitutes intentional discrimination.[3]

2. Nor does the Service's suggestion (Br. 31-32) that the competitive market was such that black agents could be hired and retained at lower salaries than white agents negate the finding of intentional discrimination. A purposeful decision to pay blacks lower salaries than whites because of their race violates Title VII, regardless of whether intentional discrimination in pay is more economical for the employer.

We argue simply that the continued intentional payment of discriminatory salaries to blacks consti-

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[3] The Service contends (Br. 30-31) that it based its pre-1965 salary determinations for black agents, at least in part, on recommendations made by the "Negro state agent" who headed the Service's "Negro Branch" before the 1965 merger. This Court has declined to "presume as a matter of law that human beings of one definable group will not discriminate against other members of their group." *Castaneda* v. *Partida*, 430 U.S. 482, 499 (1977). Moreover, regardless of the intent of the individual making salary recommendations for agents in the Negro Branch (within whatever budgetary restrictions may have been imposed on him by the Service), the Service was ultimately responsible for the salaries in the two branches.

tutes a continuing violation of Title VII (see U.S. Br. 18-20). If amici AFL-CIO intend to suggest that a racially neutral policy (dealing, for example, with promotions or incentive bonuses), consistently applied since the enactment of Title VII, constitutes a "present violation" of the Act, simply because policies previously followed placed blacks in a less advantageous position and they have failed to "catch up," we seriously disagree. Such an analysis would be directly contrary to the rule that Title VII imposes on the employer no responsibility to eliminate a practice which "gives present effect to a past act of discrimination." *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 558 (1977). For, if a nondiscriminatory failure to correct the continuing effects of pre-Act discrimination constituted a "present violation" of Title VII, then the employer who discriminated on the basis of sex before 1972 in *Evans* would have committed a "present violation" by refusing to alter the "victim's" seniority, and the employer in *Hazelwood* who discriminated in hiring before the Act necessarily would have been in "present violation" to the extent it had not remedied the pre-Act discrimination.[4]

Here, there has been a violation of Title VII because the employer has purposely continued his dis-

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[4] Contrary to the suggestion of the AFL-CIO (Am. Br. 13), we have not argued that continuation of a non-bona fide seniority system violates Title VII, in the absence of post-Act discrimination. All that we argued (U.S. Pet. 18) was that such a system adopted for discriminatory purposes prior to the Act is not entitled to protection under Section 703(h), because "an intentionally discriminatory pre-Act [seniority] system * * * affords no justification for current [employment] practices that have a race-based effect * * *." See also U.S. Br. 20. We do join the AFL-CIO in the view that the Court need not decide whether a discriminatorily adopted pre-Act seniority system necessarily violates Title VII.

criminatory system subsequent to the enactment of Title VII. With respect to salary, a victim of discrimination suffers with each check he receives, and the employer intentionally discriminates with each check he issues. It is the continuing intentional discrimination that inheres in the employer's salary payments that violates Title VII. Rather than simply failing to remedy the effect of a discrete pre-Act discriminatory action, the employer here continues its intentional discrimination on the basis of race (see U.S. Br. 18-20).[5]

3. The Service also contends (Br. 27-29) that no valid comparison of black and white agents' salaries is possible because agents are not similarly situated

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[5] The AFL-CIO incorrectly attributes to the federal petitioners the view "that pay discrimination under Title VII cannot be proved circumstantially" (Am. Br. 8-9 n.6). Our position is simply that "the plaintiff in [a] discriminatory treatment case under Title VII must establish not only * * * disparity in wages, but also the employer's intent to discriminate." U.S. Pet. 18 n.20. We do not understand the AFL-CIO or any other party or amicus to dispute the prerequisite of intent, which is compelled in the disparate treatment context by *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 335 n.15 (1977). Nor do we suggest that this requisite intent cannot be proved by circumstantial evidence —just that it must be proved. This necessarily requires examination of the reasons for any pay disparity to determine whether there has been intentional discrimination subject to a timely challenge (see U.S. Pet. 18 n.20). The point is that, while the Equal Pay Act provides that an employer will be liable based solely on a sex-based pay disparity (see *Corning Glass Works* v. *Brennan*, 417 U.S. 188 (1974)), Title VII holds liable for disparate treatment only employers who have intentionally discriminated. See note 9, *infra*. Thus, irrespective of how intent is proven, it remains true that "a current disparity in salaries, without more, cannot be the basis for this Title VII claim of discriminatory treatment" (U.S. Br. 20 n.18).

and do not perform identical jobs. Contrary to the Service's suggestion (Br. 29), the United States has not conceded and does not concede this point. To be sure, we acknowledged that county-by-county differences "should have been accounted for as part of petitioners' case in chief" (U.S. Br. 30). But we also argued that it was not necessary to include such differences as part of the regression analyses because they were explained by other evidence demonstrating that county-by-county differences were *not* the reason for salary disparities between black and white agents (U.S. Br. 30-31).[6]

Under these circumstances, petitioners carried their burden. The evidence demonstrated that statistical differences were explained neither by county-by-county differences nor job performance (see U.S. Br. 30-33), and that the regression analyses controlled for other pertinent variables; the evidence accordingly negated "the most common nondiscriminatory reasons" for the salary disparity. See *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 254 (1981). It is because the proof at trial established these elements that petitioners made out a

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[6] The Service argues that our regression analyses, "using only race, degree and tenure as variables, accounted for only 53% of the total salary variation that existed among agents and chairmen", apparently suggesting that this was because of inclusion of county chairmen in the data base (Br. 38). The Service is using a statistic known as "R^2", which determines the explanatory power of a regression analysis. In fact, the R^2 factor for the key regression analysis in this case—Dr. Giesbrecht's analysis including race, education, tenure, job level and quartile rank (job performance) as variables and *excluding* county chairmen—was even higher (66% rather than 53%) (C.A. App. 1500, 1713, 1716). This statistic indicates that the explanatory power of the critical regression analysis was high. Cf. D. Baldus & J. Cole, *Statistical Proof of Discrimination* 338-339 (1980).

case of disparate treatment. Hence, it is unnecessary to rely on private petitioners' argument (Pet. Br. 50-52) that a Title VII disparate treatment plaintiff carries his burden merely by showing that blacks as a class make less than whites with the same job title (see *ibid.*). Nevertheless, such a showing would be insufficient in light of *Burdine*'s dictate that plaintiffs must eliminate "the most common nondiscriminatory reasons" for the challenged action (450 U.S. at 254) in order to establish a prima facie case. Job title is only one nondiscriminatory criterion; it does not encompass performance, seniority, qualifications, or other usual nondiscriminatory selection factors.[7]

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[7] Petitioners state that presentation of a prima facie case "shifts to the defendant the burden of adducing evidence that the disparity [between black and white salaries] was *caused* by [a] * * * nondiscriminatory criterion" (Pet. Br. 53) (emphasis added)). Two qualifications should be added to this statement. First, while *Burdine* made clear that an employer against whom a prima facie case has been made is charged with the burden to " 'articulate some legitimate, nondiscriminatory reason' " for the action (450 U.S. at 253, citing *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973)), it also held that "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated * * * remains at all times with the plaintiff" (450 U.S. at 253 (citations omitted)). Second, if the plaintiff's proof has not accounted for factors that directly affect salary in a major way, the employer may defend by pointing out that the plaintiff's statistical evidence is not sufficient to give rise to a finding of discrimination (U.S. Br. 24-25, 33 n.34).

This allocation of proof applies to all disparate treatment cases, whether based on allegations of individual or pattern or practice discrimination. See *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 360-361 n.46 (1977) (employer's burden to rebut prima facie case of pattern or practice disparate treatment is to show that plaintiffs' proof is "inaccurate or insignificant * * * [or] to provide a

Here, petitioners employed adequate controls in their regression analyses [8] which, when considered in tandem with other evidence, negated the most common nondiscriminatory reasons for the challenged disparity. It is for this reason, not because some lesser showing is required to establish a prima facie case of disparate treatment, that the lower court's ruling on this point should be reversed.[9]

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nondiscriminatory explanation for the apparently discriminatory result"). In contrast, the requirement of *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971)—that an employer against whom a prima facie case of discrimination has been made has the burden of showing that a selection criterion is job-related—has no application where, as here, the allegations are of disparate treatment rather than disparate impact (contra Pet. Br. 67-68). Intent must be proven to make out a claim of disparate treatment under Section 703(a)(1) of Title VII.

[8] Although we have argued that a regression analysis need not include every conceivable variable, so long as the most common nondiscriminatory reasons for the disparity are negated by a plaintiff's case-in-chief, the inclusion of job title as the *only* independent variable would render the regression analysis of dubious evidentiary value, even if independent proof were offered with respect to other variables. The very value of multiple regression analysis lies in its assessment of the effects of the independent variables believed to influence the dependent variable (here, salary). See generally, Fisher, *Multiple Regression in Legal Proceedings*, 80 Colum. L. Rev. 702, 705-706 (1980); see also Gwartney, Asher, Haworth & Haworth, *Statistics, The Law, and Title VII; An Economist's View*, 54 Notre Dame Law. 633, 654-659 (1979). Limitation of the independent variables to one thus would leave the analysis with little explanatory power.

[9] While a Title VII disparate treatment plaintiff must prove intentional discrimination under the *McDonnell-Douglas* standard, the Equal Pay Act establishes liability based on a mere disparity of pay between men and women. Although the Bennett Amendment incorporated in Title VII the Equal

4. The Service contends (Br. 32-33) that petitioners did not appeal, and therefore cannot now challenge, the district court's finding (Pet. App. 163a) that petitioners did not establish "[a] violation by the defendant of any duty, statutory or otherwise, 'to take appropriate action to correct the present effects of past racially discriminatory policies and practices'." The Service errs in suggesting that the district court found as a matter of fact that there was a lack of proof that the Service failed to correct the present effects of past discrimination. Indeed, the district court found the existence of pre-Act salary disparities "undisputed," and found that these disparities had not been fully eliminated by 1972 (Pet.

Pay Act's affirmative defenses with respect to sex discrimination, it did not alter Title VII's definition of violation and thus did not modify a Title VII plaintiff's prima facie case. See *County of Washington* v. *Gunther*, 452 U.S. 161, 178-179 (1981). In any event, private petitioners have oversimplified an Equal Pay Act plaintiff's burden, because the Act requires proof that disparity in pay is for "equal work"—work which "requires equal skill, effort and responsibility, and which [is] performed under similar working conditions." 29 U.S.C. 206(d)(1). Inherent in any such proof is a showing that the disparity was not caused by several common nondiscriminatory reasons, *e.g.*, differences in requisite skill, effort, responsibility, working conditions, etc. Moreover, in weighing the evidence at the close of a case, see *United States Postal Service Board of Governors* v. *Aikens*, 460 U.S. 711 (1983), an Equal Pay Act plaintiff's burden is not significantly different from a Title VII plaintiff's burden insofar as overall proof of salary disparity is concerned. Because there is no liability where pay differences are due to a seniority or merit system or to "any other factor than sex" (*ibid.*), an Equal Pay Act plaintiff, like a Title VII plaintiff, effectively must demonstrate the absence of the more common legitimate non-sex-based explanations for pay differences.

App. 30a-31a, 120a-121a), and the court of appeals concurred in these findings (Pet. App. 359a-360a). But the court of appeals also reached the *legal* conclusion that such a failure on the part of the Service does not constitute a violation of Title VII. The United States appealed that ruling, and included it in its petition for certiorari.[10]

5. As we have argued (U.S. Br. 35), private petitioners' contention that the court of appeals should have held the Service vicariously liable for the counties' employment decisions relating to county chairmen (see, *e.g.*, Pet. Br. 70-86) is not before the Court, since the Service shared responsibility for such discriminatory decisions and is liable for its own discrimination. If the Court chooses to address the question, however, we submit that the Service may not be held vicariously liable for discriminatory actions by county officials. Title VII requires that covered employers not discriminate in their own employment practices; it does not make them "the guarantors of the workers' rights as against third parties who would infringe them." *General Building Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 396 (1982).

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[10] The private petitioners also argue that the continuation of an intentionally discriminatory pay system violates the Fourteenth Amendment (Pet. Br. 40-45). Since there is a violation of Title VII, however, it is unnecessary to consider the constitutional question. It is well established that "[t]he Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. * * * Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter." *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

Private petitioners attempt to distinguish *General Building Contractors* on the ground that Section 1981 (which was at issue in that case) requires a showing of intent, whereas Title VII also forbids employment practices which have the effect of discriminating on the basis of race (Br. 83). Such a distinction has no significance with respect to this case since, as we have seen, intent is a necessary element of a plaintiff's Title VII disparate *treatment* cause of action. But, more fundamentally, a Title VII violation requires some discriminatory action by the defendant, regardless of whether the case is based on disparate treatment or impact. An "unlawful employment practice" by an employer is required for the employer to be in violation of either Section 703 (a)(1) or (2) of Title VII. Thus, an employer violates Section 703(a)(1) only where it affirmatively "discriminate[s] against an[] individual with respect to his compensation, terms, conditions, or privileges of employment" based on race. Similarly, an employer violates subsection (2) only when it "limit[s], segregate[s] or classif[ies]" its employees based on race. There is no hint in the language or legislative history of the statute that an employer who does none of these things can violate Title VII because of the conduct of others.[11]

The Court's decision in *Arizona Governing Committee* v. *Norris*, 463 U.S. 1073 (1983), does not suggest a contrary result. In *Norris*, state employees

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[11] We do not understand private petitioners to argue that the act of delegating hiring decisions to the county officials is itself a discriminatory action within the meaning of Section 703(a)(1). To establish such a claim, a plaintiff would have to establish that the very act of delegation had a discriminatory purpose. In this case, petitioners have not attempted to make that showing.

were required by their employer to select a plan from one of several private annuity companies, all of which discriminated on the basis of sex. To be sure, the Court found a violation of Title VII, but not because a discriminatory decision was made by any or all of the annuity companies.[12] Rather, as private petitioners appear to concede (Br. 77 & n.46), the State violated Title VII by "creat[ing] a plan whereby employees can obtain the advantages of using deferred compensation to purchase an annuity only if they invest in one of the companies specifically selected by the State" (463 U.S. at 1089), and each of the companies selected by the State offered only discriminatory plans. Thus, it was the State that made an employment decision in *Norris* that violated Title VII, by limiting employees to plans that discriminated on the basis of sex. As we have seen, the Service similarly violated the Act because it cooperated with county officials in employment discrimination.[13] But the Service would not be responsible

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[12] Indeed, the Court in *Norris* (463 U.S. at 1086) reaffirmed its observation in *Los Angeles Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 717-718 (1978), that an employer would not violate Title VII by simply providing equal amounts for each employee to buy whatever benefit was available to him on the open market—even if the only annuity plans available offered lower benefits to women than to men (*Manhart*, 435 U.S. at 718). The only limit on the employer's authority noted in *Manhart* is that delegations cannot be to a "corporate shell" (*id.* at 718 n.33). There is no suggestion that the counties were "shells."

[13] Plaintiffs would have a cause of action against the counties based on their discriminatory hiring decisions, at least if the counties were shown to be "employers" or "agents" of the employer (see 42 U.S.C. 2000e(b)). Such a showing would probably not be difficult on the facts of this case, if the counties had been included in this lawsuit. Because Title VII will almost invariably provide a basis for redressing un-

for the employment decisions of discriminating third parties in the absence of its own discriminatory conduct.[14]

6. Private petitioners asked this Court to grant certiorari to determine whether retention of a "free choice" admissions program in 4-H and Extension Homemakers clubs that leaves some all-white and some all-blacks clubs fails as a matter of law to satisfy the state's affirmative duty to desegregate (see Pet. Br. i-ii, Question 3; *id.* at 45-49). In their merits brief, however, petitioners present an entirely different, fact-bound argument that there has been intentionally discriminatory recruitment of new club members since termination of the de jure system in 1965 (Pet. Br. 92-93, 95-96). Adopting the analysis first articulated by Judge Phillips in dissent below, private petitioners maintain that the courts below ignored evidence of such post-Act intentionally discriminatory recruitment because of the courts' mistaken view that only discrimination in actual admis-

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lawful discrimination by a covered employer or his agent, there is no need to read a "vicarious liability" cause of action into the statute.

[14] Since it is unnecessary to reach private petitioners' argument that Title VII makes the Service a guarantor of employees' rights against discriminatory treatment by third parties, it is *a fortiori* unnecessary to consider whether the Constitution places such burdens on an employer (see Pet. Br. 78-86). But, in any case, private petitioners do not explain why the Fourteenth Amendment would create a nondelegable duty to protect persons from discrimination by others; indeed the creation of such a duty is inconsistent with the state action limitation of the Equal Protection Clause. As with the Title VII issue, it is quite possible that private petitioners would have a constitutional claim against the Service to the extent that the Service joined in racial discrimination, but again there can be no vicarious liability.

sions, not recruitment, was prohibited by Title VI and the Constitution (Pet. Br. 93-96; Pet. App. 475a-481a). Intentionally discriminatory recruitment practices obviously violate statutory and constitutional requirements. But contrary to private petitioners' suggestion, nothing said by either court below in any way indicates that they misunderstood this basic principle. The record, however, is devoid of any evidence suggesting any discriminatory recruitment and, *a fortiori*, any evidence sufficient to overturn as clearly erroneous the concurrent findings of the courts below finding no discrimination in the Service's conduct of the clubs.

Both courts below found that defendants adhered to a policy of nondiscrimination with respect to the formation and operation of the clubs.[15] Indeed, plaintiffs presented no evidence concerning the *racial composition* of the clubs formed after 1965 (let alone of segregative conduct in their formation or membership policies), because, contrary to Judge Phillips' and private petitioners' suggestion, no party ever

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[15] Private petitioners rely on deposition testimony that the "makeup of local clubs" has been determined by a "local volunteer" (Pet. Br. 92). Contrary to petitioners' suggestion, the quoted testimony simply states the obvious fact that voluntary leaders were responsible for the admission and overall membership process in the clubs; it does not in any way indicate that such volunteers determine the "*racial* makeup" of these clubs (Jan. 30, 1973, Blalock Dep. 74). That testimony did not otherwise suggest that race was a recruitment or admissions criterion. The remaining cited transcript excerpts simply state the witness's view that the black and white communities would resist forced merger of clubs (Tr. 4996-4999, 5121-5122; J.A. 99). None of these statements indicates that the Service or community would resist voluntary integration, or that the Service in any way discouraged integration or excluded any person from recruitment or admission to clubs.

drew any distinction between clubs formed before or after the *de jure* era.[16]

It was obviously because of this complete absence of evidence, not any misconception concerning the scope or requirements of the Constitution or Title VI, that neither lower court used the specific word "recruitment" when it found that the "formation" and "services" of the clubs were nondiscriminatory, or specifically addressed the question of whether the

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[16] We note that the number of integrated 4-H Clubs grew nearly three-fold between 1972 and 1980 (586 to 1442) (C.A. App. 1807). While these seriously incomplete statistics do not tell us very much about the racial composition of clubs formed after the *de jure* period, neither these figures nor any others in the record support petitioners' assertion that "[s]ince 1965 a substantial number of new single race clubs have been organized in racially mixed communities" (Pet. Br. 92). If anything, these statistics indicate precisely the opposite: *i.e.*, that the newly formed clubs are generally integrated, while the older clubs remain substantially one-race. Of course, even this tentative inference is based on the speculative assumption that the 880 one-race clubs remaining in 1980 were, for the most part, among the 892 one-race clubs existing in 1972, and that the increased number of integrated clubs primarily resulted from formation of new clubs. There is no evidence in the record concerning whether the one-race clubs in 1972 are the same as the 1980 one-race clubs or any other evidence relating to which clubs were one-race and when they were formed. The uncertainty concerning these statistics is also greatly compounded by the fact that the clubs are extremely fluid in their membership and organization. For example, about one-third of all the 4-H Clubs are reorganized each year (Tr. 5107). Accordingly, it is not even clear what number, if any, of the clubs formed during the *de jure* period still exist today. Finally, the statistics on clubs relate to all 4-H Clubs (community clubs, project clubs and special interest clubs) while petitioners challenge only the membership of the community clubs (Tr. 4443).

respondents had engaged in segregative conduct after 1967.[17]

Thus, the sole remaining question is whether a state entity fulfills its affirmative desegregative duty where, as here, admissions are normally determined by voluntary choice, if it establishes a genuinely race-neutral admission system and refrains from segregative conduct. The private petitioners rely exclusively upon *Green* v. *School Board*, 391 U.S. 430 (1968) to argue that such a remedy is constitutionally inadequate. As we explained in our initial brief (U.S. Br. 40-50), *Green* stated no such rule.

To be sure, *Green* held that a public entity which has engaged in de jure racial segregation has an affirmative duty to desegregate and with that proposition we readily agree.

The question, however, is what types of activity are necessary to fulfill this duty. The duty, we submit, necessarily differs depending upon the degree of control the public entity normally exercises over the admission and attendance patterns of private participants. In all instances, the ultimate constitutional requirement is to take affirmative action to create a system that is free from any devices which subtly

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[17] See Pet. App. 181a, 424a n.128; J.A. 147-148. The district court also found that "[i]n working with clubs all agents work across racial lines" (Pet. App. 169a n.53). The United States and private petitioners introduced evidence at trial that the Service had assigned agents to clubs on a racial basis until 1974 (Tr. 1078-1079, 1994-1995). No finding of fact was presented to the district court on this subject, however, and it was presumably for this reason that the court did not specifically address this evidence in its opinion. There is no evidence suggesting that the Service has assigned agents on a racial basis since 1974.

exclude or separate the races. However, the degree of control dictates both the remedial action the governmental entity must undertake to undo the effects of past discrimination and the legitimacy of allowing private actors to determine where they will participate in the government program.

Where, as in public schools, the state traditionally determines if and where the private person will attend, it must engage in "remedial altering of attendance zones" to undo the effects of past discrimination by restoring the condition required by the Constitution, *i.e.*, "truly nondiscriminatory assignments." *Swann* v. *Board of Education*, 402 U.S. 1, 28 (1971). Moreover, if mandatory assignment is the norm, a conversion to a "free choice" scheme that predictably, if not designedly, results in greater segregation is impermissible because such a device only "serve[s] to perpetuate or reestablish the dual school system." *Columbus Board of Education* v. *Penick*, 443 U.S. 449, 460 (1978).

In contrast, where "free choice" is the norm, there are no compulsory discriminatory attendance patterns to redraw in order to undo the effects of past discrimination. Nor is the governmental actor constitutionally required to alter fundamentally the traditional scope and nature of its program by eliminating or restricting participants' free choice. When such private choice is the norm, continuation of such a regime is clearly not a device that fosters segregation and any racial imbalance that results is solely attributable to private actors.

Thus, properly understood, *Green* does not stand for a general proposition that private actors must be deprived of their traditionally unfettered choice unless racial balance results, it simply applies the

familiar rule that a non-unitary system may not engage in activities that foster segregation.[18]

For the foregoing reasons, and for the reasons set forth in our opening brief, the judgment of the court of appeals should be reversed in part, affirmed in part, and remanded.

Respectfully submitted.

CHARLES FRIED
Solicitor General

APRIL 1986

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[18] Thus, respondents have fully complied with the U.S.D.A. Title VI regulation requiring them to "take affirmative action to overcome the effects of prior discrimination." 7 C.F.R. 15.3(b)(6)(i). For the reasons stated above and in our initial brief (*e.g.*, U.S. Br. 38-39 n.41), a covered entity has fully eliminated the effects of past discrimination in the voluntary context when it has engaged in affirmative action to ensure that its program is open to all on an equal basis and that it avoids subsequent segregative conduct. These regulations do not in any way contemplate, as private petitioners suggest, that covered entities are required to restrict the choice of participants through, for example, merger of clubs in order to achieve a particular racial mix.

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